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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

RICARDO ROSALES GOMEZ,

Defendant and Appellant.

G057135

(Super. Ct. No. 16CF0714)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Robert Alan Knox, Judge. Affirmed.

Richard Jay Moller, under appointment by the Court of Appeal, for Defendant and Appellant.

No appearance for Plaintiff and Respondent.

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A jury found defendant guilty of possession of methamphetamine for sale (Health & Saf. Code, § 11378, count 1), transportation of methamphetamine for sale (Health & Saf. Code, § 11379, subd. (a), count 2), and one misdemeanor count of possession of drug paraphernalia (Health & Saf. Code, § 11364, subd. (a), count 3.) The court sentenced defendant to the middle term of three years in county jail on count 2; the low term of 2 years on count 1, served concurrently, and stayed pursuant to Penal Code section 654; and 52 days in county jail on count 3, served concurrently with count 2. The total sentence was three years.

Defendant timely filed a notice of appeal and we appointed counsel to represent him. Counsel did not argue against defendant, but advised the court he was unable to find an issue to argue on defendant's behalf. Defendant was given the opportunity to file written argument on his own behalf, but he has not done so.

We have examined the entire record but have not found an arguable issue on appeal. (*People v. Wende* (1979) 25 Cal.3d 436.)

FACTS

On a February evening in 2016, Officer John Rodriguez was driving his patrol car in Santa Ana when he saw a vehicle fail to stop at a stoplight. Officer Rodriguez activated his overhead emergency lights. At first, the vehicle did not immediately yield, but eventually pulled into a driveway. When the vehicle stopped, Officer Rodriguez saw the driver, who turned out to be defendant, throw a glass pipe used to smoke methamphetamine out the car window.

When Officer Rodriguez approached the driver's side of the vehicle, he saw defendant hide a green plastic baggie under his right leg. Officer Rodriguez removed defendant from the car and found the baggie on the driver's seat in which there were nine individual plastic baggies, later determined to contain methamphetamine. Officer

Rodriguez searched the vehicle and found another baggie containing three large chunks of methamphetamine, weighing 7.1 grams, in the center console. In total, approximately 14 grams of methamphetamine were recovered from the vehicle. Officer Rodriguez testified that the typical dose of methamphetamine is 0.1 grams, and a gram of methamphetamine cost about \$40 to \$60. In addition, Officer Rodriguez found nine 20-dollar bills, which were consistent with selling narcotics, and a working cell phone on defendant.

Based on the above factors, Officer Rodriguez believed that defendant was a street-level dealer, even though he did not find a pay/owe sheet or a scale. Most methamphetamine users, in contrast to dealers, have only a usable amount on their person, which is used quickly due to its addictive nature. Defendant did not display any signs of methamphetamine intoxication. Officer Rodriguez arrested defendant for possession of methamphetamine with the intent to sell.

A computer forensics detective with the Santa Ana Police Department extracted the contents of defendant's cell phone. None of the about 2000 messages on defendant's phone mentioned methamphetamine, but that is common; drug dealers typically speak in code in case they are caught by law enforcement.

Officer Rodriguez offered his opinion on the meaning of various text conversations found on defendant's phone. In one text exchange, a contact named Kung Fu Panda texted, "I want an eight. I have 70," which, according to Officer Rodriguez, referred to offering to pay \$70 for an eighth ounce of a drug. Defendant answered: "Okay." Kung Fu Panda responded: "The good kind right," referring to the quality of the drug. Defendant responded: "I don't carry the bad kind." Kung Fu Panda asked: "Are you going to come or am I going to go pick you up stupid," which referred to the manner of exchange.

In another text conversation a contact named Vale messaged, "a 40," which Officer Rodriguez believed to refer to \$40 worth of drugs. Defendant immediately

responded, “Okay I am going right now” (this was approximately one hour before Officer Rodriguez arrested defendant). Three days before, Vale asked defendant for “a 30,” which Officer Rodriguez believed was a request for \$30 worth of drugs, after which it appeared to be delivered.

At 9:30 a.m., on the day defendant was arrested he received a text message from a contact named Canicas, stating, “Oloko a 25,” which Officer Rodriguez believed was a request for \$25 worth of drugs. In another text exchange, a contact named Catrin asked for a “twenty,” which was also indicative of a drug exchange.

The day after defendant’s arrest, his cell phone received a message from a contact named Chuy: “Cocho wake up I need something a 50,” which was also consistent with requesting a drug purchase.

Officer Rodriguez concluded these text exchanges were consistent with a phone used by a drug dealer.

DISCUSSION

To assist the court in its independent review (*Anders v. State of California* (1967) 386 U.S. 738), counsel suggested we consider four issues.

The first is whether the court abused its discretion in denying defendant’s motion under *Pitchess v. Superior Court* (1974) 11 Cal.3d 531 (*Pitchess*) after finding no discoverable information. “Evidence Code sections 1043 through 1045 codify [*Pitchess*]. ‘The statutory scheme carefully balances two directly conflicting interests: the peace officer’s just claim to confidentiality, and the criminal defendant’s equally compelling interest in all information pertinent to the defense.’ [Citation.] The legislation achieves this balance primarily through a procedure of in camera review, set forth in [Evidence Code] section 1045, subdivision (b), whereby the trial court can determine whether a police officer’s personnel files contain any material relevant to the defense, with only a

minimal breach in the confidentiality of that file.” (*People v. Jackson* (1996) 13 Cal.4th 1164, 1220.) To warrant discovery, “the defendant must propose a potential defense to the pending charge, articulate how the discovery might lead to or constitute evidence providing impeachment or supporting the defense, and describe an internally consistent factual scenario of claimed officer misconduct.” (*Garcia v. Superior Court* (2007) 42 Cal.4th 63, 72.) We review the trial court’s decision for abuse of discretion. (*Jackson*, at p. 1221.)

Defendant’s discovery motion sought records from police personnel files concerning “lack of credibility/falsifying police reports,” “[a]ny incidents involving the use of force, aggressive conduct or violence in the course of their employment,” “[p]rior acts involving moral turpitude,” *Brady* material,¹ and whether the officers involved were previously employed by a different law enforcement agency. The court denied the motion. We have reviewed the transcript of the in-camera *Pitchess* hearing and find no abuse of discretion.

Second, defense counsel suggested we examine whether possession of methamphetamine for sale is a lesser-included offense to transportation for sale. If it is, he could not be convicted of both. (*People v. Kilborn* (1970) 7 Cal.App.3d 998, 1002-1003.) However, the law is well settled that possession is not a lesser included offense of transportation. As our high court explained in *People v. Rogers* (1971) 5 Cal.3d 129 “Although possession is commonly a circumstance tending to prove transportation, it is not an essential element of that offense and one may ‘transport’ marijuana or other drugs even though they are in the exclusive possession of another. [Citations.] For example, were defendant shown to have aided and abetted his passengers in carrying, conveying or concealing drugs in their possession, his conduct would have sustained a conviction of transportation.” (*Id.* at p. 134, fn. omitted, superseded by statute on other grounds in

¹ *Brady v. Maryland* (1963) 373 U.S. 83.

People v. Martinez (2018) 4 Cal.5th 647, 650; see *People v. Eagle* (2016) 246 Cal.App.4th 275, 279 [“possession of methamphetamine is not a lesser included offense of transporting methamphetamine”].)

Third, defense counsel asked us to consider whether the prosecutor committed error in her closing argument. We have reviewed her argument and find no error.

Finally, defense counsel asked us to consider whether the court properly denied defendant’s oral *Marsden* motion to relieve his counsel, which was made after defendant was sentenced. (See *People v. Marsden* (1970) 2 Cal.3d 118.) We have reviewed the sealed transcript of the hearing and find no error.

After undertaking an independent review of the entire record, we are unable to find any error reasonably arguable on appeal.

DISPOSITION

The judgment is affirmed.

IKOLA, J.

WE CONCUR:

ARONSON, ACTING P. J.

FYBEL, J.